UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GETTY IMAGES, INC.; and GETTY IMAGES (US), INC.,

Petitioners,

v.

CAR CULTURE, INC., a Florida corporation; AUTOMOBILIA II, LLC, a Florida limited liability company,

Respondents.

No.

PETITION TO COMPEL ARBITRATION BY GETTY IMAGES, INC. AND GETTY IMAGES (US), INC.

NOTE ON MOTION CALENDAR: July 15, 2022

ORAL ARGUMENT REQUESTED

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Petitioners Getty Images, Inc. and Getty Images (US), Inc., pursuant to the Federal Arbitration Act, 9 U.S.C. § 4, and a written agreement entitled the Image Partner Rights Managed Distribution Agreement, petition this Court for an order compelling arbitration of the copyright claims by Respondents in the matter *Automobilia II, LLC v. Getty Images, Inc., et al.*, No. 2:22-cv-2560 JLS(MAAx) (United States District Court, Central District of California). Respondents should be compelled to arbitrate because their claims are subject to mandatory arbitration in Seattle, Washington.

Section 4 of the FAA authorizes this Court to order Respondents to arbitrate their claims in the Western District of Washington. This Court has jurisdiction over this Petition pursuant 28 U.S.C. § 1331, 28 U.S.C. § 1332, 17 U.S.C. § 501(a) and 28 U.S.C. § 1338(a), because the Court would have jurisdiction over Respondents' underlying claims. *See* First Amended Complaint, copy attached hereto as Exhibit A. Venue in this District is proper because Respondents agreed to arbitrate in Seattle, Washington and pursuant to 9 U.S.C. § 4 and 28 U.S.C. § 1391(b).

I. PRELIMINARY STATEMENT

On April 15, 2022, Respondent Automobilia II, LLC filed a complaint asserting claims for copyright infringement in the matter *Automobilia II, LLC v. Getty Images, Inc., et al.*, No. 2:22-cv-2560 JLS(MAAx) (United States District Court, Central District of California). Automobilia II amended its pleadings on April 25, 2022, by filing of its First Amended Complaint ("FAC"). *See* Exhibit A, attached hereto. Automobilia II asserts two claims against Getty Images (US), Inc. and its parent company, Getty Images, Inc., and their distribution partner, Pixels.com, LLC, for alleged infringements of the copyrights in photographs claimed to be owned by Automobilia II.

Petitioners bring this action because the claims asserted in the California action are subject to mandatory arbitration in Seattle, Washington, pursuant to the terms of the Image Partner Rights Managed Distribution Agreement ("Image Partner Agreement"), dated September 15, 2006. By that Agreement, Respondent Car Culture, Inc. agreed to mandatory arbitration of "any dispute,

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controversy or claim arising out of or related to [the] Agreement, or the breach . . . [thereof]." That Agreement further stipulated that the arbitration would be held in Seattle, Washington and conducted pursuant to the then current rules of the American Arbitration Association. *See* Section II.D., *infra*.

Petitioners now petition this Court to compel Respondents to arbitrate their claims in Seattle, as Car Culture agreed when it signed the Image Partner Agreement. Pursuant to 9 U.S.C. § 4, this Court has authority to order the parties to arbitration to be held in the Western District of Washington.[1] Concurrent with the filing of this Petition, Petitioners will file a motion to stay further proceedings in the California action pending the Court's consideration of this Petition and, should the Petition be granted, pending a final resolution of the arbitration in Seattle.

II. STATEMENT OF FACTS

This lawsuit involves certain car-themed photographs taken by Lucinda Lewis. First Amended Complaint ("FAC") ¶ 8. As alleged, Ms. Lewis transferred the copyrights in the subject photographs to Automobilia II, *see* FAC ¶ 8, which is a limited liability company created and owned by her. *See* Section II.B., *infra*. Ms. Lewis owns a second company, Car Culture, Inc., and she identified that company as the contracting party when she signed the Image Partner Agreement for the distribution of her photographs. *See* Section II.C., *infra*. As admitted in the FAC, Car Culture acted as Automobilia II's "licensee" in connection with that contractual relationship with Getty Images (US), Inc. FAC ¶¶ 27, 39.

[1] This Court has clear authority to compel an arbitration to occur in this judicial district. 9 U.S.C. § 4 ("The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed."); *Continental Grain Co. v. Dant & Russell*, 118 F.2d 967, 969 (1941). The authority of a district court sitting in any other district is less clear. *Allied Prof. Ins. Co. v. Harmon*, 2017 U.S. Dist. LEXIS 216872, at *16 (C.D. Cal. July 28, 2017) (holding court can compel arbitration "to occur only in its district"); *Powell v. United Rentals (N. Am.), Inc.*, U.S. Dist. LEXIS 33232, at *3 (W.D. Wash. Mar. 1, 2019) (questioning whether court had authority to order arbitration outside of judicial district in which it sits), *later proceedings,* 2019 U.S. Dist. LEXIS 57722, at *23 (W.D. Wash. Apr. 3, 2019) (transferring case *sua sponte* to District of Connecticut).

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A. Petitioners Getty Images, Inc. and Getty Images (US), Inc.

As alleged in the FAC, Getty Images, Inc. is a global licensor of photographic imagery and other content. FAC ¶ 12. Getty Images, Inc. is alleged to have its principal place of business in Seattle, Washington. FAC ¶ 4. The FAC further alleges that Getty Images, Inc. licenses content to media companies for print and online publishing, and to creative professionals and corporate clients in advertising and other fields. FAC ¶ 12. The company's alleged distribution of photographic imagery includes distribution via the Internet. *Id*.

Getty Images (US), Inc. is a subsidiary of Getty Images, Inc. and also has its principal place of business in Seattle, Washington. FAC ¶¶ 5, 13. Getty Images (US), Inc. distributes photographs to customers through its own facilities (*i.e.*, websites and other delivery mechanisms), as well as through "partners," including Pixels.com. FAC ¶¶ 13, 16.

As alleged in the FAC, Pixels.com operates the websites Photos.com, Pixels.com and FineArtAmerica.com that allow customers to print copies of photographs from a digital archive belonging to Petitoners. FAC ¶¶ 14, 19. Automobilia II alleges that Petitioners were not authorized to distribute Ms. Lewis' photographs via the websites operated by Pixels.com. Examples purporting to show those infringements are attached to the FAC. *See* FAC, Ex. B (Photos.com) & Ex. C (Pixels.com and FineArtAmerica.com.)

B. Respondents Car Culture, Inc. and Automobilia II, LLC.

Lucinda Lewis owns and operates two companies in connection with her photography business:

- **Car Culture, Inc.**, formerly known as **Machine Age, Inc.**, was incorporated by Ms. Lewis in 1992 in California and later registered in Florida. Declaration of Scott T. Wilsdon ("Wilsdon Decl.") ¶¶ 2 - 6, Exs. A - D.

- **Automobilia II, LLC**, formerly known as **Car Culture Library, LLC**, was created by Ms. Lewis created in 2006 in California and later registered in Florida. Wilsdon Decl. ¶¶ 7 - 11, Exs. E - H.

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Ms. Lewis is the Chief Executive Officer, President and Secretary and the sole director of Car Culture, Inc., as disclosed the corporation's filings with the Secretary of State. Wilsdon Decl. ¶ 4, Ex. C. Ms. Lewis is the sole manager and the sole member of Automobilia II, LLC, as disclosed in the limited liability company's filings with the Secretary of State. Wilsdon Decl. ¶¶ 9, 10 & Ex. H (listing Ms. Lewis as the sole Managing Member of Automobilia II, LLC).

C. 2006 Image Partner Agreement.

On September 15, 2006, Ms. Lewis signed the Image Partner Agreement with Getty Images (US), Inc. for the distribution of her photographs. Declaration of Helen Gudgeon ("Gudgeon Decl."), Ex. A. That contract formed the basis of a 13-year contractual relationship between Ms. Lewis and Getty Images (US), Inc. and established terms and conditions for the company's distribution of Ms. Lewis' photographs. Ms. Lewis signed the Agreement as "President" of Car Culture, Inc. Image Partner Agreement, at 9.

The Image Partner Agreement granted Getty Images (US), Inc. an exclusive license to distribute Ms. Lewis' photographs through its "wholly owned offices" and "through its network of delegates and distributors." Image Partner Agreement § 2.1. That network of "delegates" and "distributors" included distribution partners such as Pixels.com. In return, Ms. Lewis received royalties from Getty Images (US), Inc. for each photograph it distributed. Image Partner Agreement § 8.3.[2]

The Image Partner Agreement remained in place from September 15, 2006, until November 7, 2019, when Getty Images (US), Inc. gave notice of its decision to terminate the Agreement. Gudgeon Decl., Ex. B. The termination was effective 90-days after the notice. Image Partner Agreement § 5.2. The Agreement, at Section 5.4, granted Getty Images (US), Inc. and its distribution partners a second 90-day term to wind up their distribution activities and remove the photographs. Image Partner Agreement § 5.4. Ms. Lewis and her company were paid royalties

[2] The royalty percentage paid to Ms. Lewis has been redacted in Section 8.3 of the Image Partner Agreement because that information is treated as confidential and proprietary business information. Gudgeon Decl. ¶ 5 & Ex. A.

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during the 90-day wind-up term. Declaration of Vaughn Bench ("Bench Decl."), Ex. A (print-on-demand royalty statements for 2019 and 2020).

Each of the 155 alleged infringements attached to the FAC occurred ***before*** the deadline for removing Ms. Lewis' photographs. *See* FAC, Ex. B (Photos.com) & Ex. C (Pixels.com and FineArtAmerica.com.) Hence, every example of infringement claimed by Automobilia II occurred during (1) the term of the Image Partner Agreement, or (2) the 90-day windup period during which Getty Images (US), Inc. and its partners were permitted to continue to display and distribute the photographs. Image Partner Agreement §§ 5.2, 5.4.

D. Agreement to Arbitrate.

Section 14.2 of the Image Partner Agreement sets forth the parties' agreement to arbitrate any dispute, controversy or claim "arising out of or related to" the Agreement or a claimed breach thereof. That provision reads in full as follows:

> 14.2 Controlling Law. This Agreement shall be interpreted, construed and governed by the laws of the State of Washington, U.S.A. ***Any dispute, controversy or claim between the parties arising out of or related to this Agreement, or the breach, termination or invalidity hereof*** shall be settled by binding arbitration to be held in Seattle, WA, U.S.A., pursuant to the then current rules of the American Arbitration Association ("AAA"). The parties agree that one arbitrator shall be selected for the proceeding, utilizing the AAA's normal rules and procedures for arbitrator selection.

Gudgeon Decl., Ex. A, § 14.2 (emphasis supplied).

E. Prior Copyright Claims by Respondents.

This lawsuit is a continuation of a dispute that began in 2019 when Ms. Lewis questioned the scope of rights granted to Getty Images (US), Inc. in the 2006 Image Partner Agreement. Specifically, Ms. Lewis and her lawyer argued that the 2006 Image Partner Agreement did not permit the distribution of photographs for the purpose of creating "merchandise." Declaration of Isabella Nicholson ("Nicholson Decl."), Ex. A (demand letter from Ms. Lewis' copyright lawyer, dated July 26, 2019).

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The timing of Ms. Lewis' objections coincides with the alleged examples of infringement she attached as Exhibits B and C to the FAC. FAC, Ex. B (screenshots of Photos.com, dated April 23, 2019 to June 8, 2019) & Ex. C (screenshots of Pixels.com and FineArtAmerica.com, dated April 23, 2019 to May 3, 2020). The substance of Ms. Lewis' objections – that Getty Images (US), Inc. was distributing her photographs in a manner not permitted by the Image Partner Agreement – also matches the allegations made against Petitioners in the FAC. That is, that Getty Images (US), Inc. did not have the right to distribute Ms. Lewis' photographs via the print-on-demand websites operated by Pixels.com. FAC ¶¶ 17, 21 & 22.

III. LEGAL ARGUMENT

The Federal Arbitration Act makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA reflects a "liberal federal policy favoring arbitration" and reinforces the "fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (citations omitted). The FAA requires courts to "rigorously enforce" agreements to arbitrate, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985), to ensure that private agreements to arbitrate "are enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010).

On a motion to compel arbitration, a district court must determine "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1130 (9th Cir. 2000). The party seeking to compel arbitration has the burden under the FAA to show these two elements. *Ashbey v. Archstone Property Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th Cir. 2015). However, "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

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A. The Image Partner Agreement Is a Valid and Enforceable Agreement.

The FAA applies to any written arbitration agreement that involves interstate commerce. *Circuit City Stores v. Adams*, 532 U.S. 105, 112-13, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001); *Prima Paint Corp. v. Flood Conklin Mfg. Co.*, 388 U.S. 395, 401-02 & n.7, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). Congress intended to "exercise [its] commerce power to the full" in the arbitration context, setting a very low bar for showing an effect on commerce. *Circuit City*, 532 U.S. at 112 (quoting *Allied Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995)). The FAA incorporates "the broadest possible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alfabco, Inc.*, 539 U.S. 52, 56-57, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003).

The interstate commerce requirement is satisfied for purposes of arbitration any time the agreement either facilitates or affects commerce in some way, directly or indirectly. *Prima Paint*, 388 U.S. at 401-02. In this case, Automobilia II admits in its FAC that Getty Images, Inc. "has distribution offices around the world" and uses the Internet to distribute its content. FAC ¶ 12. Plainly the interstate commerce requirement is satisfied.

B. The Agreement to Arbitrate Is a Broad Agreement that Encompasses the Claims in the FAC.

Upon finding the existence of a valid and enforceable agreement to arbitrate, the court must consider whether the dispute falls within the scope of the arbitration agreement. *Mitsubishi*, 473 U.S. at 626; *Chiron Corp.*, 207 F.3d at 1130. "'[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Chiron Corp.*, 207 F.3d at 1131 (quoting *Moses H. Cone*, 460 U.S. at 24-25)). The party resisting arbitration bears the burden of showing the agreement does not cover the claims at issue. *Green Tree Fin. Corp.-Ala. V. Randolph*, 531 U.S. 79, 91-92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000).

1. Delegation of Arbitrability to Arbitrator.

As an initial matter, Section 14.2 expressly incorporates the "the then current rules of the American Arbitration Association." Image Partner Agreement § 14.2. The Ninth Circuit has consistently held that incorporation of arbitration rules "constitutes clear and unmistakable evidence

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that the contracting parties agreed to arbitrate arbitrability." *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015).

In this case, Rule R-7(a) of the AAA Commercial Arbitration Rules expressly provides that the arbitrator has the authority to rule on "any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Wilsdon Decl., Ex. J. In such cases, whether the claims in the FAC fall within the scope of Section 14.2 has been delegated exclusively to the arbitrator. *Raven Offshore Yacht Shipping, LLP v. F.T. Holdings, LLC*, 199 Wn. App. 534, 541, 400 P.3d 347 (2017) (reversing trial court's denial of motion to compel arbitration, holding parties has delegated arbitrability to arbitrator by incorporating Marine Arbitration Association rules); *Woolley v. El Toro.com, LLC*, 2021 Wash. App. LEXIS 1140 (Wash. Ct. App., Division One, May 3, 2021) (following *Raven Offshore Shipping*, holding parties' incorporation of AAA commercial rules, including Rule R-7(a), delegated arbitrability to arbitrator).

2. Determination of Arbitrability by Court.

The same result should obtain should this Court determine the arbitrability of the claims in the FAC. Section 14.2 is a "broad" arbitration clause under Ninth Circuit law. *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 922 (9th Cir. 2011), *cert. denied*, 566 U.S. 929 (2012). The Ninth Circuit interprets "broadly" arbitration clauses that contain the language "arising out of or relating to" the agreement, as used in Section 14.2. *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983); *Cape Flattery*, 647 F.3d at 922.

When an arbitration clause is interpreted "broadly," the clause "reaches every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 717, 721 (9th Cir. 1999); *Chartwell Staffing Servs. V. Atl. Solutions Grp, Inc.*, 2020 U.S. Dist. LEXIS 24640, at *10 (C.D. Cal. Jan. 9, 2020) (holding "broad" arbitration clause encompassed plaintiff's trade secret claims). Further, the dispute at issue "need only 'touch matters' covered by the contract" in order for the court to resolve all doubts in favor of arbitration. *Simula*, 175 F.3d at 721 (citations omitted)..

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Section 14.2 is broad and unambiguously applies to the claims in the FAC. It requires arbitration of any dispute, controversy or claim "arising out of or related to" the Agreement or the breach, termination or invalidity thereof. Image Partner Agreement, § 14.2. The FAC alleges that Getty Images, Inc. and Getty Images (US), Inc. are liable for copyright infringement because they allegedly supplied their "archive" of photographs or otherwise allowed those photographs to be distributed via the print-on-demand websites operated by Pixels.com. FAC ¶¶ 13, 17, 21 & 22. As set forth above, every example of infringement claimed by Automobilia II, *see* FAC, Exs. B & C, occurred during (1) the term of the Image Partner Agreement, or (2) the 90-day windup period during which Getty Images (US), Inc. and its partners were permitted to continue to distribute the photographs. *See* Section II.C., *supra*.

As a result, the copyright claims in the FAC rise and fall on the scope of rights granted to Getty Images (US), Inc. in the Image Partner Agreement. That is true even though Automobilia II purposefully omitted any reference to the Agreement in the FAC. The district court in *Chartwell Staffing*[3] confronted this issue when plaintiff amended its pleadings to drop its claim for breach of contract because the contract was subject to mandatory arbitration. Noting that amendment, the Court ruled:

> [W]hile [plaintiff] has not brought a claim for breach of contract [under the amended complaint], it has certainly set forth allegations that constitute "violation[s] of [the] Agreement[s]" and that accordingly, fall within the plain terms of the arbitration clause.

Chartwell Staffing, 2020 U.S. Dist. LEXIS 24640, at *10 (holding plaintiff's federal and state trade secrets claims fell within the scope of the agreements). The district court went on to hold that non-signatory defendants could compel arbitration because plaintiff's claims "are so bound up with the obligations imposed under the [agreements]" that plaintiff "must rely on the terms of the written

[3] The District Judge in *Chartwell Staffing* was the Honorable Josephine L. Staton, who is presiding over the underlying case *Automobilia II, LLC v. Getty Images, Inc., et al.*, No. 2:22-cv-2560 JLS (United States District Court, Central District of California).

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agreement[s] in asserting its claims" against defendants. *Id.*, 2020 U.S. Dist. LEXIS 24640, at *12-*13.

So, too, this Court should hold that Automobilia II's copyright claims fall within the plain terms of the arbitration clause in Section 14.2. Those claims exist only to the extent that Getty Images (US), Inc. acted in a manner not permitted by the Image Partner Agreement. That is, Automobilia II cannot prove its claim for copyright infringement without proving that Getty Images (US), Inc. breached its obligations under the 2006 Image Partner Agreement. *Chartwell Staffing*, 2020 U.S. Dist. LEXIS 24640, at *10.

C. Signatory Car Culture Is Bound by the Agreement to Arbitrate.

Ms. Lewis executed the Image Partner Agreement in the name of her company, Car Culture. By that act, she bound Car Culture to the mandatory arbitration terms in Section 14.2. At least one of the copyright registrations identified in Exhibit A to the FAC is registered in the name of Car Culture, Inc. Wilsdon Decl., Ex. I (listing copyright claimant for registration VA0000647827 as Machine Age, Inc., which is the former name of Car Culture, Inc.); *see also* Wilsdon Decl. ¶¶ 12, 13 & Ex. F (changing name from Machine Age, Inc. to Car Culture, Inc.). As such, Car Culture is the party with legal standing to bring claims for alleged infringements of works covered by registration VA0000647827. *See* 17 U.S.C. § 501.

In violation of its agreement to mandatory arbitration, Car Culture and Ms. Lewis elected to pursue copyright infringement claims against Petitioners by filing the action in the Central District of California. Every example of infringement claimed in the First Amended Complaint (*see* FAC, Exs. B & C) occurred during (1) the term of the Image Partner Agreement, or (2) the 90-day windup period during which Getty Images (US), Inc. and its partners were permitted to continue to distribute the photographs. *See* Section II.C., *supra*. Plainly, these claims "arise out of" and "relate to" the rights and obligations in the Image Partner Agreement and are therefore subject to mandatory arbitration. That is unquestionably true of infringement claims relating to works covered by copyright registration VA0000647827, for which Car Culture is the copyright claimant.

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D. Non-Signatory Automobilia II Is Bound by the Agreement to Arbitrate.

Ms. Lewis' second company, Automobilia II, is also bound by the terms of the Image Partner Agreement she signed in 2006. The Ninth Circuit has long recognized that a non-signatory can be bound by an arbitration clause based on "ordinary contract and agency principles," *Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986), and under the theory of equitable estoppel. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006). At least five theories are recognized: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, and (6) equitable estoppel. *Comer*, 436 F.3d at 1101. A district court looks to state law in determining who may compel arbitration. *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1217 (9th Cir. 2008); *Chartwell Staffing*, 2020 U.S. Dist. LEXIS 24640, at *11. In this case, the parties' agreement includes a Washington choice of law. Image Partner Agreement § 14.2 ("This Agreement shall be interpreted, construed and governed by the laws of the State of Washington.").

1. Automobilia II Is Bound by Contract Principles.

By its terms, the Image Partner Agreement signed by Ms. Lewis is binding on her company Automobilia II. While Ms. Lewis signed that Agreement as an officer of her second company, Car Culture, the Agreement expressly contemplated performance by Automobilia II. Section 14.4 requires consent to an assignment of any obligations under the Agreement "[e]xcept to an entity that is a parent, subsidiary or ***affiliate***." Image Partner Agreement § 14.4 (emphasis supplied). In this case, Car Culture was more than a mere "affiliate" of Automobilia II; it was an admitted "licensee" of Automobilia in connection with the distribution agreement with Getty Images (US), Inc. FAC ¶¶ 27, 30. The Image Partner Agreement having been executed its licensee Car Culture, licensor Automobilia II, the purported owner of the copyrights in the photographic works, was a third-party beneficiary of the Agreement. *Postlewait Constr. v. Great Am. Ins. Cos.*, 106 Wn. 2d 96, 99, 720 P.2d 805 (1986).

The Image Partner Agreement does not define the meaning of "affiliate." In such cases, courts construe words according to their plain and ordinary meaning. *Revitch v. DIRECTV, LLC*, 997 F.3d 713, 717 (9th Cir. 2020). The Ninth Circuit has defined an "affiliate" as "a company

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effectively controlled by another or associated with others under common ownership or control." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (quoting Webster's Third New International Dictionary 35 (2002)). Automobilia II, which shares common ownership and control with Car Culture in the form of Ms. Lewis, falls squarely within the definition of an "affiliate." *AMA Multimedia LLC v. Sagan Ltd.*, 2017 U.S. Dist. LEXIS 10991, at *20-*21 (D. Ariz. Jan. 26, 2017) (non-signatory corporate defendants held to be "affiliates" under contract, based on common ownership, and therefore were subject to forum selection clause).

Moreover, the FAC alleges that Ms. Lewis "transferred" the copyrights to her photographs to Automobilia II. FAC ¶ 8. The purported assignment is necessary for Automobilia II to have standing to sue under the Copyright Act.[4] *See* 17 U.S.C. § 501(b). While the FAC does not disclose ***when*** the purported assignment occurred, it is of no matter. If Ms. Lewis assigned those rights ***after*** she signed the 2006 Image Partner Agreement, then Automobilia is bound under the Agreement as a "successor or assign" in Section 14.4. Image Partner Agreement § 14.4 ("[T]his Agreement will be fully binding upon, inure to the benefit of, and be enforceable by the parties ***and their respective successors and assigns."***) (emphasis supplied). Alternatively, if Ms. Lewis assigned the copyrights ***before*** she signed the 2006 Image Partner Agreement, Automobilia II is bound by the acts of its agents (Ms. Lewis or Car Culture, or both) acting with actual or apparent authority. *See* Section III.D.2., *infra*.

Lastly, the Image Partner Agreement required Ms. Lewis and her company to warrant their authority to grant exclusive distribution rights to Getty Images (US), Inc. That included a warranty that Car Culture "has and shall have during the term of this Agreement, sufficient rights in [its] Products to grant Getty Images the rights set forth in this Agreement." Image Partner Agreement § 9.2. Where such rights are held by another party, such as Automobilia II appears to claim in the FAC, Ms. Lewis and her company were expressly required to warrant that they had "any necessary

[4] As previously noted, at least one of the copyright registrations identified in the FAC remains registered in the name of Car Culture, Inc. Wilsdon Decl., Ex. I; *see also* Section III.C., *supra*.

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approval, consent, authorization, release, clearance or license of [Car Culture] ***or any other Third Party.***" *Id.* (emphasis supplied).

Thus, by signing the Agreement, Ms. Lewis warranted that her first company (Car Culture) had "approval, consent, authorization . . . or license" from her second company (Automobilia II). Having "approved" or "consented" to the distribution agreement, Automobilia II is bound by its terms, including mandatory arbitration of its copyright claims. Again, Automobilia II is bound by Car Culture's agreement to arbitrate under ordinary contract principles. *Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn. 2d 745, 489 P.2d 923 (1971) (holding individual defendants liable for approving false representations and warranties by contracting party).

2. Automobilia II Is Bound by Agency Principles.

Automobilia II is further bound to Car Culture's agreement to arbitrate under agency principles. The Ninth Circuit has explained that non-signatories of arbitration agreements "may be bound by the agreement under ordinary contract and agency principles." *Letizia*, 802 F.2d at 1187 (citations omitted). Under Washington law, whether a non-signatory may be bound to an arbitration agreement "turns on traditional principles of agency law." *SVN Cornerstone LLC v. N 807 Inc.*, 2017 Wash. App. LEXIS 1231 (Wash. Ct. of App., Division Three, May 23, 2017).

Here, Automobilia II admits that Car Culture acted as its "licensee" in connection with the distribution agreement with Getty Images (US), Inc. FAC ¶¶ 27, 30. Further, Ms. Lewis and her company represented that Car Culture had "approval, consent, authorization or license" from Automobilia II to carry out its obligations under the Image Partner Agreement, including its grant of exclusive distribution rights to Getty Images (US), Inc. Image Partner Agreement § 9.2.

Washington follows the nearly universal rule that a principal is bound by agreements made by its agent acting with actual or apparent authority. *T-Mobile USA, Inc. v. Selective Ins. Co. of Am.*, 194 Wn. 2d 413, 450 P.3d 150 (2019); *see also P.E.V.'s, Inc. v. Kurtti*, 2003 Wash. App. LEXIS 2106 (Wash. Ct. of App., Division One, Sept. 22, 2003). In this case, agents Ms. Lewis and Car Culture acted with actual or apparent authority of principal Automobilia II when Ms. Lewis signed the Image Partner Agreement. Both companies are owned and operated by Ms. Lewis, the

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warranties given by Ms. Lewis and Car Culture required "approval, consent, authorization . . . or license" from Automobilia II, *see* Image Partner Agreement § 9.2, and Automobilia II admits Car Culture acted as its "licensee" in connection with the distribution agreement with Getty Images (US), Inc.[5] FAC ¶¶ 27, 30.

3. Automobilia II Is Bound by Principle of Equitable Estoppel.

The same facts that compel Automobilia II to arbitrate under contract and agency principles dictate the same result under the principle of equitable estoppel. Equitable estoppel "precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Mundi v. Union Sec. Life Ins. Co*., 555 F.3d 1042, 1045 (9th Cir. 2009). Equitable estoppel may also exist "if there is both a 'close relationship between the entities involved,' and a 'relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations.'" *Soto v. American Honda Motor Co., Inc*., 946 F. Supp. 2d 949, 955 (N.D. Cal. 2012) (quoting *Mundi*, 555 F.3d at 1046).

Washington courts follows a similar approach. "Washington courts, like federal courts, have recognized that both equitable estoppel and 'normal contract and agency principles' permit non-parties to arbitration agreements to compel arbitration." *All for Kidz, Inc. v. Around the World Yoyo Entm't Co.*, 2014 U.S. Dist. LEXIS 64004, at *6-7 (W.D. Wash. May 8, 2014) (citing *McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 890 P.2d 466, 467 (1995)); *Townsend v. Quadrant Corp.,* 2009 Wash. App. LEXIS 2629, 218 P.3d 230, 240 (2009).

Ms. Lewis and Car Culture were entitled to and did receive royalty payments from Getty Images (US), Inc. up to and including the 90-day windup term in spring 2020, including royalties paid for distribution by print-on-demand. Bench Decl., Ex. A (print-on-demand royalty statements

[5] Automobilia II cannot escape this outcome by claiming the agency was not disclosed to Getty Images (US), Inc. Under Washington law, an agent and its ***undisclosed*** principal are jointly and severally liable for contracts formed on behalf of the ***undisclosed*** principal. *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 706, 756 P.2d 717 (1988); *see also* Restatement (Third) of Agency § 2.06.

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for 2019 and 2020.)[6] Moreover, the Image Partner Agreement includes a provision prohibiting assignment (absent Getty Images (US), Inc.'s agreement) of any of Car Culture's rights "including through a change of control for Partner" under the Agreement, "except [for assignments] to an entity that is a parent, subsidiary or affiliate" of Car Culture. Image Partner Agreement § 14.4. As noted above, Car Culture also warrantied that it "has and shall have during the term of this Agreement, sufficient rights in [Car Culture's] Products to grant Getty Images (US), Inc. the rights set forth in this Agreement." Image Partner Agreement § 9.2.

Automobilia II accepted the benefits of the Image Partner Agreement through Car Culture, which was in turn prohibited from assigning its rights to any entity other than a "parent, subsidiary or affiliate." Given these facts and the common singular ownership of both companies by Ms. Lewis, Automobilia is equitably estopped from avoiding the arbitration provision in the Agreement. *David Terry Investments, LLC-PRC v. Headwaters Development Group LLC*, 13 Wn. App. 2d 159, 171, 463 P.2d 117 (2020) (applying equitable estoppel to compel arbitration of claims against non-signatory where claims were "based on the same facts" and were "inherently inseparable" from arbitrable claims against signatory).

E. The Agreement to Arbitrate Is Enforceable by Non-Signatory Getty Images, Inc.

Getty Images (US), Inc. is a signatory to the 2006 Image Partner Agreement. Its parent company, Getty Images, Inc. is not. However, just as a non-signatory may be bound by an arbitration agreement, so, too can a non-signatory enforce an arbitration clause based on "ordinary contract and agency principles," *Letizia*, 802 F.2d at 1187, and under the theory of equitable estoppel. *Comer*, 436 F.3d at 1101. A district court looks to state law in determining who may compel arbitration. *Lowden*, 512 F.3d at 1217 (9th Cir. 2008); *Chartwell Staffing*, 2020 U.S. Dist. LEXIS 24640, at *11. In this case, as previously noted, the Image Partner Agreement specifies that Washington law applies. Image Partner Agreement § 14.2.

[6] The amount of each print-on-demand royalty payment to Ms. Lewis and her company has been redacted because that information is treated as confidential and proprietary business information. Bench Decl. ¶ 4.

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Washington courts have long held that a non-signatory may enforce an agreement to arbitration under "normal contract and agency principles" and under the theory of equitable estoppel. *Wiese v. CACH, LLC*, 189 Wn. App. 466, 358 P.3d 1213, 1222 (2015); *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 889, 224 P.3d 818 (2009), *aff'd* 173 Wn. 2d 451, 268 P. 3d 917 (2012); *McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 315, 890 P.2d 466 (1995); *Loyola v. American Credit Acceptance LLC*, 2019 U.S. Dist. LEXIS 64285, at *24 (E.D. Wash. Apr. 15, 2019) (applying Washington law, holding non-signatory agent could compel arbitration agreement because to hold otherwise "would eviscerate the arbitration agreement").

The 2006 Image Partner Agreement is enforceable by parent company Getty Images, Inc. under ordinary contract and agency principles. In this case, the Agreement expressly contemplated performance by "an entity that is a ***parent***, subsidiary or affiliate . . . ." Image Partner Agreement § 14.4 (emphasis supplied). As a contemplated party under the Agreement, parent company Getty Images, Inc. is entitled to enforce its terms, including the parties' agreement to mandatory arbitration. *Schmidt v. Samsung Elecs. Am., Inc.*, 2017 U.S. Dist. LEXIS 80768, at *20 (W.D. Wash. May 25, 2017) (applying Washington law, holding parent companies could enforce arbitration agreement as "affiliates" of subsidiary company).

Moreover, Washington law allows a non-signatory to enforce an arbitration agreement under the theory of equitable estoppel. *Townsend*, 153 Wn. App. at 889. That is, where the claims against a parent and a subsidiary are "based on the same facts . . . and are inherently inseparable, a court may order arbitration of claims against the parent even though the parent is not a party to the arbitration agreement." *Id.*, 153 Wn. App. at 889 (citing *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988)); *see also David Terry Investments*, 13 Wn. App. 2d at 171.

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IV. CONCLUSION

For the reasons stated, this Court should order Respondents Car Culture and Automobilia II to arbitrate their claims pursuant to Section 14.2 of the 2006 Image Partner Agreement.

DATED: June 23, 2022.

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